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September 6, 2017

TO: Katrina Harrison
ROC on LTO Project Manager
Bureau of Reclamation
Bay-Delta Office
801 I Street Suite 140
Sacramento, CA 95814

RE: Trinity River Alternative for the Reinitiation of Consultation on the CVP non-jeopardy Biological Opinion

Dear Ms. Harrison

I attended a June 7 teleconference with PCFFA consultant Tom Stokely regarding reinitiation of consultation under the Endangered Species Act for the Central Valley Project. You had requested suggestions for alternatives to be considered during the process. Tom Stokely verbally outlined an alternative that would protect listed coho salmon and Tribal Trust assets in the Trinity River and Lower Klamath River. This letter includes both the legal justification for the alternative as well as the specifics of the proposed "Trinity River Protection Alternative" that would require Reclamation through terms and conditions in the NMFS Biological Opinion as well as amendment of Reclamation's Trinity River state water permits to current instream flows, North Coast Basin Plan temperature objectives and Trinity Reservoir cold water carryover storage.

Consistency with Existing Laws:

The unique protection afforded the Trinity River, its fisheries and water is embodied in State and federal law. The special legal status of the Trinity River, and the federal mandate to do no harm to its salmon runs, has been expressed in numerous legal opinions, court decisions and administrative actions at both the State and federal level. While the Trinity River Division is "fully integrated" with the CVP, its special status creates a priority for the use of Trinity River water for Trinity River fisheries and other in-basin uses that is legally superior to any other use of CVP water outside of the Trinity River basin.

The proposed alternative is consistent with federal and state mandates to protect, preserve, propagate and restore the Trinity River's fisheries as described below.

Federal Laws and Policies:

The *Trinity River Act of 1955* (PL 84-386) "directed and authorized" the Secretary of Interior to "preserve and propagate" the fish and wildlife resources of the Trinity River.

Another provision in the *Trinity River Act of 1955* reserved 50,000 acre-feet for Humboldt County and downstream water users that is embodied in a 1959 water contract between the Humboldt County Board of Supervisors and the Bureau of Reclamation that is separate from fishery flows. A 2014 Solicitor's Opinion has reaffirmed this long-standing water right and the fact that it is in addition to fishery flows under the Trinity River Record of Decision.¹ This fact of law was recently upheld by the Ninth Circuit Court of Appeals in a case that PCFFA intervened on behalf of the federal government.²

The Trinity River Basin Fish and Wildlife Restoration Act of 1984 (PL 98-541) clarified the "preserve and propagate" language from the 1955 Trinity River Act to mean "...restoring fish and wildlife populations in the Trinity River basin to a level approximating that existed immediately before the construction of the Trinity River division."

Under the Tribal Trust Doctrine, and the federally reserved fishing rights of the Hoopa Valley and Yurok Tribes there is a property right associated with the flows of the Trinity River. These rights date back 10,000 years or time immemorial, making them senior to any water rights obtained by the Bureau of Reclamation for the Central Valley Project.

The Central Valley Project Improvement Act, P.L. 102-575 (CVPIA) acknowledged the difference between the Trinity River and Central Valley streams by having separate fishery restoration goals for each basin.

The primacy of the waters of the Trinity River for use in the Trinity River basin is explained in a 1979 opinion by Interior Solicitor by Leo Krulitz on the water contract and drought shortage provisions with the Grasslands Water District:³

"...in authorizing the Trinity River Division in 1955, Congress specifically provided that in-basin flows (in excess of a statutorily prescribed minimum) determined by

¹ "Trinity River Division's 50,000 Acre-Foot Proviso and the 1959 Contract Between the Bureau of Reclamation and Humboldt County", U.S. Department of Interior Solicitor Opinion M-37030, Hilary C. Tompkins, December 23, 2014. Accessed at <https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/M-37030.pdf>

² San Luis Delta Mendota Water Authority and Westlands Water District v. Department of Interior (No 14-17493, D.C. No. 1:13-cv-01232-LJO-GSA), February 21, 2017.

³ Interior Solicitor to Assistant Secretary for Land and Water Resources regarding Proposed Contract with Grasslands Water District, December 7, 1979. Accessed at <http://bit.ly/2vwa1dr>

the Secretary to meet in-basin needs take precedence over needs to be served by out of basin diversions.”

The Federal Clean Water Act Section 303 approval by the United States Environmental Protection Agency of Trinity River Water Quality Objectives in 1992⁴ constituted establishment of a federal water quality standard that all federal agencies, including the Bureau of Reclamation must comply with. USEPA also stated in their approval that Trinity River diversions to the Sacramento River are a controllable factor in the protection of the Trinity River and have harmed the Trinity River.

The 2000 Trinity River Record of Decision (ROD page 17)⁵ clearly stated as follows:

“From the inception of the TRD, Congress directed this Department to ensure the preservation and continued propagation of the Trinity River’s fishery resources and to divert to the Central Valley only those waters surplus to the needs of the Trinity Basin.”

State Laws and Policies:

The Trinity River’s fisheries also have protections under the concept of the Public Trust Doctrine, as expressed in the Mono Lake Opinion (*National Audubon Society vs. Alpine County Superior Court*). *“The public trust...is an affirmation of the duty of the state to protect the people’s common heritage of streams, lakes, marshlands and tidelands....”* – Supreme Court of California, 1983.

The Area of Origin and Watershed Protection Statutes under California law also contain a priority for in-basin uses compared to out of basin uses. The waters of the Trinity River are subject to California’s Watershed Protection, Area of Origin and County of Origin Statutes (California Water Code Sections 10505, 11128 and 11460 *et seq.*) that limit the export of its waters to surplus flows only. Water Code Section 11128 specifically applies the watershed protection and county of origin statutes to the Bureau of Reclamation’s Central Valley Project, which includes the Trinity River Division of the CVP.

The California Department of Fish and Game (DFG), in its 22 June 2004 comments on the Supplemental EIS/EIR for the Trinity River Mainstem Fishery Restoration Program⁶ stated that impacts to listed species in the Central Valley and Delta as a result of increased Trinity River flows (and decreased Trinity exports to the Sacramento River) are not a “significant impact” requiring mitigation under the California Environmental Quality Act. DFG cited California’s watershed protection and area of origin statutes as the rationale for the determination that the priority for Trinity River water is within that basin:

⁴ Letter from USEPA Region IX Administrator to Chairman of the California State Water Resources Control Board, March 13, 1992. Accessed at <http://bit.ly/2vG8QqL>

⁵ See https://www.fws.gov/arcata/fisheries/reports/technical/Trinity_ROD.pdf

⁶ Trinity Supplemental EIS/EIR comments from California Department of Fish and Game Region 1 Manager to Russell Smith, USBR and Tom Stokely, Trinity County. Accessed at <http://bit.ly/2xbDqh9>

"In California, the controls put in place governing a single source of water supply from two separate basins, requires needs for beneficial uses in the basin of origin be met first- then needs can be supplied for the other basin."

The North Coast Regional Water Quality Control Board and the California State Water Resources Control Board approved Trinity River temperature objectives in 1991, which were approved by USEPA in 1992.⁷

The concept of doing no harm to the Trinity River is also manifested in Water Right Order 90-05 (WRO 90-05)⁸, which contained a term and condition prohibiting harm to the Trinity River as it relates to the export of Trinity River water to the Sacramento River for temperature control on the Sacramento River.

Need for Trinity River Protection Alternative

There is no assurance that the Trinity River and its beneficial uses will be protected from CVP operations because Reclamation's eight Trinity River water permits are not consistent with North Coast Basin Plan temperature objectives and instream flows under the Trinity ROD. Furthermore, the 600,000 acre foot Trinity Reservoir minimum cold water carryover storage requirement in the 2000 NMFS Biological for the Trinity River⁹ is inadequate to prevent temperature induced mortality in the Trinity River, particularly during multi-year drought.

The CVP OCAP does nothing to mitigate or prevent catastrophic loss of cold-water storage and basic flows to keep fish in good condition below Trinity and Lewiston Dams, as required by the federal government's Tribal Trust obligations and California Fish and Game Code Section 5937.

Multi-year drought increases the risk to the Trinity and Lower Klamath rivers of losing the cold water stored in Trinity Reservoir to out of basin export. It is essential to note that Trinity River water provides beneficial uses for Coho (listed as threatened) and Chinook salmon, as well as steelhead, Pacific Lamprey, green sturgeon and other species important to Tribal, recreational and commercial fishing communities.

In 1958, the Bureau of Reclamation, pursuant to section 8 of the 1902 Reclamation Act

⁷ "Water Quality Control Plan for the North Coast Region" Footnote 5, Table 3-1, page 3-8.00:
Accessed at http://www.waterboards.ca.gov/northcoast/water_issues/programs/basin_plan/083105-bp/04_water_quality_objectives.pdf

Daily Average Not to Exceed	Period	River Reach
60°F	July 1- Sept 15	Lewiston to Douglas City Bridge
56°F	Sept 15-Oct 1	Lewiston to Douglas City Bridge
56°F	Oct 1- Dec 31	Lewiston to North Fork Confluence

⁸ See Water Right Order 90-05, pages 61-62. Accessed at
https://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/1990/wro90-05.pdf

⁹ See https://www.fws.gov/arcata/fisheries/reports/technical/TREIS_BO_NMFS.pdf

applied to the state for water rights to operate the TRD, but those water rights contain minimum fishery flows of only 120,500 AF. Trinity ROD flows and Humboldt County's 50,000 AF water contract amount to a weighted annual average of 644,000 AF.

Reclamation has admitted that it does not operate to any specific Trinity Reservoir carryover storage requirement and does not consider water quality objectives¹⁰ contained in the North Coast Basin Plan as water permit terms and conditions.

Trinity River temperature objectives to protect salmon and steelhead been adopted by the North Coast Regional Water Quality Control Board, the State Water Resources Control Board and USEPA have not been fully incorporated into water permit requirements for the Bureau of Reclamation, creating a regulatory gap.

Reclamation does consider Water Right Order 90-05 (WRO 90-05) to be a permit term and condition but it is not consistent with North Coast Basin Plan Temperature objectives for the Trinity River. WRO 90-05 includes Trinity River North Coast Basin Plan temperature requirements for the September 15- December 31 period but omits the Basin Plan temperature objective for the Trinity River July 1- September 15 period. Additionally, the WRO 90-05 September 15 through December temperature requirement only applies to transfers of Trinity River water to the Sacramento River for temperature control. All other uses of Trinity River water sent to the Sacramento River are not covered by the temperature requirements of WRO 90-05. Reclamation refuses to acknowledge that North Coast Basin Plan requirements are Clean Water Act Section 313 standards that they must comply with because they are not water permit terms and conditions.¹¹ Thus, comprehensive Trinity River Basin Plan temperature objectives should be included in Reclamation's water permits.

The NMFS 2000 Biological Opinion¹² for the Trinity River, includes a minimum carryover storage in Trinity Reservoir on September 30 of 600,000 AF and requires reconsultation if storage falls below that level, which it did in 2014. However, other analyses have found that a 600,000 AF minimum carryover storage is inadequate. A 2012 report by Reclamation found that September 30 carryover storage requirement of less than 750,000 AF is "problematic" in meeting state and federal Trinity River temperature objectives protective of the fishery.¹³

¹⁰ See 2/23/11 letter from Paul Fujitani, Chief of CVP Ops to Brian Person, Chairman Trinity Management Council; accessed at: <http://bit.ly/2tulvQc>

¹¹ Ibid : <http://bit.ly/2tulvQc>

¹² National Marine Fisheries Service (2000), Biological Opinion for the Trinity River Record of Decision, accessed at: http://www.fws.gov/arcata/fisheries/reports/technical/TREIS_BO_NMFS.pdf

¹³ See Bender MD (2012) Trinity Reservoir Carryover Storage Cold Water Pool Sensitivity Analysis. Technical Memorandum No. 86-68220-12-06, U.S. Bureau of Reclamation, Technical Service Center, Denver, CO. Accessed at <http://odp.trrp.net/Data/Documents/Details.aspx?document=1813>

In 1992 Balance Hydrologics found that a minimum carryover storage of 900,000 AF was necessary to meet Basin Plan temperature objectives.¹⁴

Analyses completed for Trinity County for the Trinity Record of Decision by Kamman Hydrologics indicated that September 30 Trinity Reservoir carryover storage of at least 1.2 million AF on September 30 is necessary at the beginning of a simulated 1928-1934 drought in order to meet Basin Plan temperature objectives.¹⁵ During the recent drought, Trinity Reservoir storage fell below levels necessary to survive a historic multi-year drought such as 1928-1934.

Furthermore, Reclamation's Mid-Pacific office also produced a preliminary technical memorandum on the problem of excessive heating of Trinity Dam releases¹⁶ when they pass through the shallow 7-mile long Lewiston Reservoir. While Trinity Dam releases are normally 43-44°F, summer heating in Lewiston Reservoir can be severe unless approximately 1,800 cfs is being released from Trinity Dam. Given that Trinity River summer base flows are only 450 cfs, water must be diverted to the Sacramento River to keep the Trinity River cold enough to meet Basin Plan temperature objectives. However, during severe drought or under certain operational circumstances, there may not be adequate water to provide base fishery flows and to divert water to the Sacramento River to keep the Trinity River cold. Several structural solutions have been identified in Reclamation's preliminary technical memorandum; however, a full feasibility study and environmental document would need to be prepared to select a solution and no such plans exist at this time.

Additionally, the delivery of CVP water to Sacramento River Settlement Contractors who are post-1914 diverters when other post-1914 diverters are enjoined from diversions through state curtailment orders unlawfully depletes storage in Trinity Reservoir and deprives the Trinity River basin area of origin from needed cold water, while also bypassing the priority of water rights in the Sacramento Valley.

Furthermore, during summer and fall, Trinity River diversions to the Sacramento River are often warmer than Shasta Dam releases by three degrees F or more. Diversion of large amounts of Trinity River water to the Sacramento harms Sacramento River salmon through warming and depletes Trinity Reservoir of cold water.

Therefore, in order for the Trinity River to be protected, the revised Biological Opinion should require that Reclamation's is required to comply with the following terms and conditions and that Reclamation's Trinity River water permits be amended as well, as

¹⁴ See Balance Hydrologics (6/26/1992) "The Need for Standards for Minimum Carryover Storage in Trinity Reservoir" Accessed at <http://tcrcd.net/trl-stor.htm>

¹⁵ Memorandum from Greg Kamman to Tom Stokely and Mike Deas on Carryover Storage Analysis Simulated (1928-34) Period, 5/22/1998. Accessed at http://www.c-win.org/webfm_send/414

¹⁶ See USBR (2012) Lewiston Temperature Management Intermediate Technical Memorandum, Lewiston Reservoir, Trinity County, California. Report by U. S. Bureau of Reclamation, Mid-Pacific Region, Sacramento, CA. accessed at <http://odp.trrp.net/Data/Documents/Details.aspx?document=1814>

directed in SWRCB Water Quality Order 89-18.¹⁷ The conditions for Reclamation are as follows:

1. Conformance with the instream fishery flows contained in the Trinity River Record of Decision.
2. Provision for release of Humboldt County's 50,000 AF in addition to fishery flows per the 1955 Trinity River Act.
3. Inclusion of permit terms and conditions to require Reclamation to comply with the Trinity River temperature objectives contained in the Water Quality Control Plan for the North Coast Region (NCRWQCB) for all relevant time periods and for all uses of Trinity water diverted to the Sacramento River.
4. A requirement for a minimum cold water storage in Trinity Reservoir adequate to preserve and propagate all runs of salmon and steelhead in the Trinity River below Lewiston Dam during multi-year drought. Based on studies to date, a range of 900,000 AF to 1.2 million AF is appropriate.
5. Require Reclamation to address the temperature issue in Lewiston Reservoir through a feasibility study and environmental document to follow up on the 2012 preliminary technical memorandum by Reclamation.
6. When releases from Spring Creek are more than one degree Fahrenheit warmer than releases from Shasta Dam, limit the export of Trinity River water to the Sacramento River to the amount necessary to meet Trinity River Basin Plan Temperature Objectives. This protects both Trinity and Sacramento River salmon.

Thank you for your consideration of this alternative. If you have any questions please contact me at 415-561-5080 and Tom Stokely at 530-524-0315.

Sincerely,



Noah Oppenheim
Executive Director

CC:

Paul Souza, USFWS
Bruce Bingham, USFWS

¹⁷ See SWRCB Water Quality Order 89-18 (pages 18 and 19) at
http://www.waterboards.ca.gov/board_decisions/adopted_orders/water_quality/1989/wq1989_18.pdf

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